July 22, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: In the Matters of Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services via Fiber to the Premises AND Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; WC Docket No. 04-242

Dear Ms. Dortch:

Attached are comments of the Association for Local Telecommunications Services ("ALTS") for filing in the above-captioned proceeding.

Sincerely,

/s/

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services via Fiber to the Premises	)	
	)	
and	)	WC Docket No. 04-242
	)	
Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises	)	
	)	

COMMENTS OF THE
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS") hereby files its comments in the above-referenced proceeding in response to the Commission's Public Notice[1] regarding Verizon's Petitions concerning regulatory treatment of its broadband services provided via fiber to the premises ("FTTP").[2] The Verizon Petitions are merely a ploy to pressure the Commission into prejudging the rulemaking proceedings in which it is already squarely considering the appropriate regulatory treatment for wireline broadband services. ALTS urges the Commission to deny the Verizon Petitions because granting interim relief here would be

[1] *Pleading Cycle Established for Comments on Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services via Fiber to the Premises AND Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises*, Public Notice, WC Docket No. 04-242 (rel. July 1, 2004).

[2] Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services via Fiber to the Premises and Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; WC Docket No. 04-242 (filed June 28, 2004) ("Verizon Petitions").

premature and unnecessary. These issues are more appropriately addressed in the Commission's pending rulemaking proceedings where a complete record has been developed. ALTS has opposed deregulation of the ILEC's broadband transmission services in those proceedings and hopes the Commission will continue to foster wireline broadband competition by maintaining appropriate regulation of ILEC transmission facilities.

I. The Proper Fora for Verizon's Requested Relief Are the Commission's Pending Rulemaking Proceedings, and The Commission Should Not Grant Verizon Temporary Relief While It Considers Those Proceedings.

In its petitions, Verizon seeks permission to offer those of its broadband services that are provided via fiber to the premises ("FTTP") in the same manner that cable companies offer broadband services via cable modem.[3] Verizon couches its request in the form of a petition for declaratory ruling, or alternatively a waiver and forbearance of Title II regulation of its FTTP broadband services, but it is clearly just a ploy to push the Commission into making a quicker decision in its pending rulemaking proceedings, which Verizon acknowledges squarely address these issues.[4] Verizon treats certain Commission proposals as conclusive and boldly asks the Commission here to grant temporary relief before the Commission has even formally decided the broader long-term issue. The Commission should not yield to Verizon's pressure but should continue with its deliberation in those rulemaking proceedings. Granting interim relief in these circumstances would set a dangerous precedent, opening the door to hoards of similar requests by carriers seeking interim relief while the Commission considers its many open proceedings.

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[3] Attachment A to Verizon Petitions, *Memorandum of Points and Authorities in Support of Verizon's Petition for Declaratory Ruling or for Interim Waiver and Conditional Petition for Forbearance with Respect to Broadband Services Provided via Fiber to the Premise*s) ("Verizon Memorandum") at 1.

[4] Verizon Memorandum at 2.

In its *Broadband NPRM*,[5] the Commission is considering the statutory classification of wireline Internet access services and the appropriate regulatory framework for those services. Specifically, the Commission is considering whether those services are "telecommunications services" or "information services" under the Telecom Act. The Commission tentatively concluded that "when an entity provides wireline broadband Internet access service over its own transmission facilities, [it] is an information service under the Act [and] … that the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is 'telecommunications' and not a 'telecommunications service.'"[6] In focusing on the definition of these services, the Commission is contemplating to what extent the ILECs should be subject to common carrier regulations for their broadband transmission services. In the *ILEC Non-Dominance NPRM*, the Commission is also considering the appropriate regulatory treatment of the ILECs' retail broadband services to the extent that they are determined non-dominant providers of those services.[7]

Verizon specifically requests temporary regulatory relief while these ongoing rulemakings are pending[8] and presupposes that the Commission will grant such permanent relief when it issues orders in those proceedings. Whether or not that is the case, Verizon is in no way entitled to, nor does it need, interim relief while the Commission fully evaluates the record in those proceedings. While it is true the Commission made tentative conclusions that, if adopted,

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[5] *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10 (rel. Feb. 15, 2002) ("Broadband NPRM").

[6] Broadband NPRM ¶ 17.

[7] *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* Notice of Proposed Rulemaking, CC Docket No 01-337, (rel. 2002) ("ILEC Non-Dominance NPRM") .

[8] Verizon Memorandum at 2.

might lead to regulatory relief for the ILECs' broadband services, those tentative conclusions are by no means foregone conclusions. The records in those proceedings highlight the flaws in the Commission's rationale for contemplating such relief, and ALTS sincerely hopes that the Commission will reconsider its proposals and maintain Title II regulation of ILEC broadband transmission facilities.

Moreover, temporary relief here for Verizon, in particular, is unnecessary. One of the Commission's primary objectives in proposing reduced regulation for ILEC broadband services is to provide incentive for further deployment. However, Verizon argues in its petitions that it "urgently" needs regulatory relief *after* it has already deployed its new FTTP and is just two months away from rolling out services to its customers.[9] Surely in these circumstances, reduced regulation is not required to induce Verizon to deploy broadband facilities since it has already deployed them and appears heavily invested in deploying in other areas while it still is subject to regulatory requirements. Because it made these decisions without reliance on regulatory relief, it must have determined that the current regulatory requirements would not hamper its ability to earn a sufficient return on its investments.

In short, the relief Verizon requests on an "interim" basis is just as inappropriate as the relief it seeks in the *Broadband NPRM* proceeding. Verizon asks the Commission to declare it non-dominant, or in the alternative forbear from dominant carrier regulations, for facilities used to provide both retail services and wholesale services. There is no question that Verizon has an incentive to abuse its market power to disadvantage broadband rivals, by charging higher prices to rivals for essential inputs, providing rivals with poor quality interconnection, or imposing

[9] Verizon Memorandum at 2.

unnecessary delays. Verizon cites "intermodal" competition from cable modem providers as a sufficient safeguard in the absence of regulation. It is questionable whether intermodal competition from cable modem providers would discipline ILEC anti-competitive behavior in the *retail* market without regulatory safeguards, but it would certainly not discipline the ILECs' anticompetitive behavior in the *wholesale* market for last-mile bottleneck facilities, where the ILECs maintain a monopoly. Thus, Verizon's argument about competitive retail offerings is, if anything, only an argument in support of deregulation of its retail service offerings, and not elimination of its unbundling obligations.

Verizon argues in its petition that the Commission should expand the vast deregulation of broadband transmission facilities already provided in the Commission's *Triennial Review Order*. Verizon fails to explain, however, how the freedom from unbundling obligations for new, fiber to the home loops already granted to Verizon and other ILECs is insufficient incentive to deploy such facilities. In the Triennial Review proceeding, the Commission completely exempted ILECs from providing access to the packetized broadband transmission capabilities of hybrid fiber-copper loops as UNEs.[10] The Commission completely exempted ILECs from providing access to the broadband transmission capabilities of fiber-to-the-home loops as UNEs, in both newbuild and overbuild situations.[11] Furthermore, the Commission eliminated even its limited existing UNE rules for packet-switching,[12] and limited competitors to accessing broadband transmission facilities in the enterprise market with legacy TDM-based interfaces.[13] In sum, the

[10] *See* Triennial Review Order ¶¶ 285-297.

[11] *See* i*d.* ¶¶ 273-284.

[12] *See* i*d.* ¶¶ 535-541.

[13] *See id.* ¶¶ 298-342.

Commission's *Triennial Review Order* already provides the ILECs with a staggering amount of deregulation for both mass market and enterprise loop facilities. Verizon does not explain how additional relief could provide any incentives for further fiber deployment, given that Verizon has already succeeded in convincing the FCC to exempt such deployment from most regulation.

Verizon's request for temporary relief here is akin to a teenager asking his parents to let him take their car for a spin while they are deciding whether he can have a driver's license or not. It is premature and misguided, and a waste of both Commission and industry resources forced to respond to these frivolous petitions. The Commission should not entertain requests for temporary regulatory relief when it has not determined what permanent regulatory treatment will apply to wireline broadband services. The Commission should recognize the Verizon Petitions as a pressure tactic and reject them outright.

II. The Commission's *Cable Modem Decision* Is Not Dispositive Over Regulation of Wireline Broadband Services.

In its petitions, Verizon insinuates that there is no need for the Commission to engage in any thoughtful analysis in its pending rulemaking proceedings regarding wireline broadband services, since it has already determined in its *Cable Modem Decision* that Internet access service provided over cable modem is an "information service" not subject to common carrier regulation.[14] While the Commission described the *Broadband NPRM* as the "functional equivalent" of the *Cable Modem NOI*,[15] the *Cable Modem Decision* should in no way prejudice the Commission's decision in the *Broadband* proceeding. As described below, there are significant differences between wireline and cable modem services that justify disparate

[14] Verizon Memorandum at 1.

[15] Broadband NPRM ¶ 9.

regulatory treatment. Moreover, reliance on the *Cable Modem Decision* is misplaced after the Ninth Circuit overturned the Commission's classification of cable modem service as exclusively an information service.[16] Specifically, the Ninth Circuit found that cable modem service has both information service and telecommunications service components.[17] Thus, the status of the regulatory treatment of cable modem broadband service is itself uncertain, and Verizon's insistence that the *Cable Modem Decision* is settled law in support of its claims is ludicrous.[18]

In their ongoing push to gain deregulation of their broadband services, the ILECs conveniently choose to ignore the fact that the cable and wireline broadband serve different consumers.[19] Cable primarily serves residential customers, and wireline serves small and large businesses. Regulatory treatment of one should not drive the other. Only in the residential broadband market does cable modem service provide an alternative to ILEC retail services. But in this duopoly market, the ILEC and cable modem provider exercise significant market power. There is no third choice. The inadequacy of a facilities duopoly for ensuring consumer choice is not seriously disputed, even by the ILECs. In fact, the *Cable Modem Decision* explicitly chose not to address the role of cable-based broadband services in business markets[20] – the market largely served by wireline providers. Thus, by its own terms, the Commission's *Cable Modem Decision* addressed an entirely different market with its own unique characteristics. To apply the

[16] *Brand X Internet Svcs v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[17] *Id.*

[18] Verizon Memorandum at 1.

[19] *See* ALTS Reply Comments on Broadband NPRM at 16 (filed July 1, 2002).

[20] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other* Facilities, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, ¶ 1, n. 5 ("Cable Modem Decision").

Commission's reasoning in that proceeding to a different market would be nonsensical and irresponsible.

Moreover, the historical differences between cable and wireline deployment require different regulatory treatment.[21] The telephone network was funded by ratepayer dollars under a governmentally sanctioned monopoly, while the cable broadband network was largely built on risk capital. Moreover, statutory and historical differences, as well as differences in network architecture, ubiquity of facilities coverage and market coverage, fully explain the Congressional requirement that telecommunications and cable services be differently regulated. Thus, a long history and a reasoned basis support differing regulatory treatment of cable and wireline systems, and nothing in the record demonstrates any legitimate justification for the Commission to converge these regulatory structures.

As a result of these different histories, while the telephone network was built to provide access to an unlimited number of enhanced service providers and voice customers alike, cable systems have traditionally been closed, used to carry only the cable companies' video services.[22] Accordingly, unlike wireline facilities, in a cable system, the FCC has concluded, "the multiple-ISP environment requires a re-thinking of many technical, operational and financial issues, including implementation of routing techniques to accommodate multiple ISPs."[23] Whatever the merits of that conclusion, it was an important predicate to the Commission's cable ruling, and it does not apply here. No "re-thinking" is required to maintain the status quo on the wireline side.

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[21] *See* ALTS Reply Comments on Broadband NPRM at 17-8 (filed July 1, 2002).

[22] *See* Joint Reply Comments of WorldCom, CompTel, and ALTS on Broadband NPRM at 27-28 (filed July 1, 2002).

[23] Cable Modem Decision ¶ 29.

In sum, there are compelling reasons to continue to subject wireline broadband service providers as common carriers, regardless of how providers of cable modem service are categorized.

The cornerstone of Verizon's request here is its assertion of a need for regulatory parity between cable and wireline broadband providers, which it appears to justify by any means necessary, even the elimination of competition in the wireline market. However, the Commission should not and cannot endorse a sweeping reversal of precedent and policy in the name of regulatory parity without a substantive competitive analysis of the effect of such a move on wireline broadband competition. Moreover, the Commission should not make any decision here to eliminate regulation on a temporary basis while it is still in the midst of determining if that regulation is necessary and appropriate on a permanent basis.

III. Increased Competition, Not Widespread Deregulation, Is The Best Method To Spur Innovation And Further Deployment In An Industry Where Monopoly Providers Control Bottleneck Facilities.

The Commission seeks to "best balance the goals of encouraging broadband investment and deployment, fostering competition in the provision of broadband services, promoting innovation, and eliminating unnecessary regulation."[24] ALTS shares these goals and believes the best public policy is to encourage deployment of broadband services by continuing to foster both inter-modal and intra-modal facilities-based competition. Widespread deregulation will not guarantee additional broadband deployment, but increased competition provides proper incentives for all carriers. Multiple firms trying different strategies are far more likely than a monopoly to produce innovative products. A fundamental underpinning of the 1996 Act is that competition among service providers is the surest means of ensuring the availability to

[24] ILEC Non-Dominance NPRM ¶ 4.

consumers of an array of telecommunications services at reasonable prices. Competitive local exchange companies have invested over $70 billion in constructing new broadband telecommunications networks since the passage of the Telecommunications Act in 1996. The CLECs were the first companies to introduce DSL into the marketplace and developed many other innovative technologies based upon the unbundling rules set out to enforce the Act. The best way to advance the deployment of broadband technologies is to enforce the current policies that promote facilities-based competition.

Merely deregulating the ILECs would not provide incentive for them to roll-out better broadband services to more consumers. The ILECs have already shown their propensity to behave like monopolists because they suffer no consequences. And the ILECs continue to dominate the market for DSL-based services regardless of their position *vis a vis* the cable modem providers. Deregulation of ILEC facilities would create, at best, a duopoly in the residential broadband market. Exempting the ILECs from opening their markets to competitors would destroy the new entrepreneurial competitive telecom companies and, at best, leave consumers with just two choices – the ILEC or the cable modem provider. This would create a duopoly, not widespread competition. Furthermore, deregulating ILECs for broadband services would grant them a virtual monopoly in the non-residential market because business customers do not have access to cable modem providers.

Whatever the Commission does in its rulemaking proceedings must be supported by a careful analysis that looks to the ultimate question in any competitive analysis: whether and how an action will benefit consumers. While subjecting the ILECs to continuing common carrier regulation will result in great consumer benefits for both ILEC and cable customers, there are no

substantiated harms from subjecting the ILECs to asymmetrical treatment.[25] Spurred by cable and data CLEC deployment, the ILECs have been actively deploying facilities to provide Internet access services, notwithstanding the alleged "burdens" imposed by the current regulatory regime. The ILECs' ubiquitous loop plant is their most valuable asset. As shown by their actions, they have powerful incentive to upgrade that plant to respond to competitive pressures. The real risk to "broadband" deployment would come by granting the ILECs the unrestrained ability to exercise their market power.

There is nothing to be gained by granting Verizon temporary regulatory relief, where it has already deployed broadband facilities and plans to offer services within two months. Granting temporary relief would allow Verizon to further leverage his monopoly position in the market, causing harm to competitors and consumers. The Commission should continue to support policies that increase competition and encourage deployment by all carriers.

[25] *See* Joint Reply Comments of WorldCom, CompTel, and ALTS on Broadband NPRM at 25-26 (filed July 1, 2002).

CONCLUSION

For the foregoing reasons, ALTS urges the Commission to reject the Verizon Petitions because they are premature and misguided. The Commission should instead focus on its rulemaking decisions which consider the appropriate regulatory treatment of broadband services and should grant regulatory relief for retail service offerings only after careful consideration of the records in those proceedings.

Respectfully Submitted,

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